

**THE STATE BAR OF CALIFORNIA  
COMMISSION FOR THE REVISION OF  
THE RULES OF PROFESSIONAL CONDUCT**

**\*REVISED MEETING SUMMARY - OPEN SESSION\***

**Friday, June 7, 2002  
(Video-Conference Meeting)**

**SF-State Bar Office  
180 Howard Street, Room 8-B  
San Francisco, CA 94105**

**LA-State Bar Office  
1149 So. Hill Street, Room 723  
Los Angeles, CA 90015**

**MEMBERS PRESENT:** Harry Sondheim (Chair) [LA]; Ed George [LA]; Stan Lamport [LA]; Raul Martinez [LA]; Tony Voogd [LA]; Linda Foy [SF]; JoElla Julien [SF]; Kurt Melchior [SF]; Ellen Peck [LA]; Ignacio Ruvolo [SF]; Jerry Sapiro [SF]; Mark Tuft [SF]; and Paul Vapnek [SF].

**ALSO PRESENT:** Kevin Mohr (Commission Consultant); Randall Difuntorum, Robert Hawley, Audrey Hollins, Elbert Lee, Lauren McCurdy, Mary Yen (State Bar staff); David Boyd (Sacramento County Bar Association); Ira Spiro (ADR Committee); and Phillip Feldman.

**I.     APPROVAL OF THE OPEN SESSION ACTION SUMMARY FROM MARCH 17, 2002 MEETING**

Action Summary approved as amended. (Revised Action Summary attached.)

**II.    REMARKS OF THE CHAIR**

**A.     State Bar Action on Selection of Vice-Chair**

Staff provided an oral report on applicant interviews requested by the State Bar President.

**B. State Bar 6<sup>th</sup> Annual Ethics Symposium**

Mr. Mohr provided an oral report. It was agreed that the Chair would work with Mr. Vapnek and Mr. Mohr in presenting the report portion of the program. For the open forum portion of the program, all members of the Commission were invited to participate with COPRAC Chair Robbie Westberg to act as moderator.

**C. Discussion of Location and Schedule of Meetings After October 2002**

The Chair reported that staff was investigating the possibility of utilizing the State Bar video conference facilities to enhance public access to the open session portion of Commission meetings. For example, the members of the Commission could meet at the Los Angeles State Bar office with the audio and video of the meeting simultaneously fed to a San Francisco State Bar office open to the public. During the discussion, it was suggested that staff explore the possibility of scheduling a two-day meeting in the next committee year.

**D. Discussion of Commission's Strategic Plan**

The Chair and staff reported on a State Bar training session held on June 3, 2002 concerning the new State Bar interim Strategic Plan and the new requirement for all State Bar sub-entities to submit annual work plans. Following discussion, the Commission authorized leadership to work with staff to finalize a work plan for submission on the State Bar's July 10, 2002 deadline. In addition, the Commission authorized submission of a written comment to the State Bar recommending that the State Bar's Interim Strategic Plan should be clarified to specifically address the Board's role in monitoring the need for amendments to the Rules of Professional Conduct.

**III. MATTERS FOR ACTION**

**A. Consideration of Rule 1-110. Disciplinary Authority of the State Bar**

Mr. Lamport and Mr. Voogd presented proposed discussion section language. Following discussion, a redraft was requested and the Chair clarified the assignment to include proposed amendments, if any, to the title of the rule and the rule text (see, March 17, 2002 meeting summary), as well as the new comment. During the discussion, it was suggested that the codrafters clarify the word "rules" in the proposed new discussion section and consider what is meant by the phrase "conditions of discipline."

**B. Consideration of Rule 1-120. Assisting, Soliciting, or Inducing Violations**

Mr. Tuft presented three versions of a proposed new discussion section prepared by him and Ms. Betzner. Initially, it was noted that no change to the rule text is recommended at this time and, specifically, that the consensus of the members is that this rule should not include a mandatory obligation to report misconduct by another lawyer. The Chair indicated that he may draft a minority position to be included in the Commission's report stating arguments in favor of a reporting requirement.

Among the points raised during the discussion were the following: (1) some lawyers believe that reporting is required by the rules; (2) any new discussion language should not discourage an attorney from reporting misconduct; (3) published cases citing rule 1-120 have cited it to clarify the absence of a reporting requirement in California; (4) other law, beyond the rules and the State Bar Act, may require reporting and if these laws are violated, it is possible that misconduct could be charged under §6068(a); (5) consideration should be given to citing San Diego Ethics Opinion 1992-2 in any new discussion language; (6) in many instances, a client may be prejudiced by their attorney's reporting of misconduct by the opposing counsel; (7) the new language has the potential of decreasing public protection if it hinders State Bar discovery of lawyer misconduct; and (8) determining the scope of this new discussion language seems to require revisiting rule 1-100 and the purpose of the rules.

Following discussion, additional alternate proposals for a new discussion section were distributed (see attachment) and straw votes were taken on versions 5, 6, 7 and 8 to ascertain initial viewpoints. The straw votes did not reveal a consensus as version 5 received two votes, version 6 received one vote, version 7 received two votes and version 8 received five votes. Mr. Tuft and Ms. Betzner were assigned to seek further member input on the alternatives and prepare a recommendation and redraft for the next meeting.

**C. Consideration of Proposal Arising from Discussion of Rule 1-120**

Mr. Vapnek presented a proposed new rule codifying within the rules attorney misconduct standards not found in the rules. The Chair indicated that the deliberations, at this stage, should be a concept discussion rather than a wordsmithing exercise.

Among the points raised during the discussion were the following: (1) conceptually, the idea of consolidating various misconduct provisions has merit because it makes California's professional responsibility standards more

accessible to lawyers; (2) as presently drafted, the proposal seems too broad; (3) promulgating a rule that repeats statutory prohibitions carries a risk of duplicative charging of ethical violations; however, Supreme Court and State Bar Court disciplinary case law has addressed this concern as to existing provisions that overlap (i.e., rule 3-500 and §6068(m)); (4) this type of rule may be subject to constant revision as statutes and case law change; ABA Model Rule 8.4 should be the starting point; (5) a rule replacement for the former offensive personality prohibition of §6068(f) also needs to be covered; (6) multiple objectives (i.e., Model Rule 8.4, §6068(f) and consolidation of various statutory and case law concepts) is too much for any one rule; (7) determining the proper scope of this rule seems to require revisiting the purpose of the rules as covered in rule 1-100; and (8) if the concept of a consolidation rule is abandoned, then the co-drafters should memorialize the consideration and rejection of the proposal for inclusion in the Commission's ultimate report.

Following discussion, straw votes were taken to ascertain consensus on certain issues. The straw votes revealed: (1) a consensus to revisit rule 1-100; (2) no consensus to completely abandon a rule that consolidates various statutory and case law concepts; and (3) a consensus to use Model Rule 8.4 as a starting point. Ms. Peck and Mr. Vapnek were assigned to prepare a redraft for the next meeting. In addition, Mr. Mohr volunteered to assist the co-drafters by surveying state variations of Model Rule 8.4.

**D. Consideration of Rule 1-200. False Statement Regarding Admission to the State Bar**

Ms. Foy and Mr. Sapiro presented a proposed amended rule and discussion section. Among the points raised during the discussion were the following: (1) at an appropriate future time, the rule may have to be amended to address MJP issues; (2) proposed paragraph (D) should not be too specific as such specificity can be included in the discussion section; (3) proposed paragraph (A) should be changed to an active voice like proposed paragraph (B); (3) the language should be clear that there is no affirmative 'whistleblower' obligation; and (4) regulating the conduct of members prior to, or in connection with, State Bar admission is a power exclusive to the Supreme Court and therefore can be a subject appropriate for the rules.

Following discussion, Ms. Foy and Mr. Sapiro were assigned to prepare a redraft for the next meeting. In addition, the Chair asked all members to review the ABA's final MJP report.

**E. Consideration of Rule 1-300. Unauthorized Practice of Law**

It was agreed that discussion of this rule would be carried over to the next meeting and coordinated with a discussion of rule 1-100. Staffed was asked to distribute the Washington state definition of the “practice of law.” A question was raised as to whether mediation should be considered the “practice of law.” Another question was raised concerning limitations on COPRAC opinions addressing unauthorized practice of law. Staff was asked to report back on COPRAC question at the next meeting. Mrs. Julien; Mr. Lamport and Mr. Melchior were assigned to prepare an issues outline and recommendation concerning both rules 1-100 and 1-300.

**F. Consideration of Rule 1-310. Forming a Partnership With a Non-Lawyer**

The Chair invited discussion of whether consideration of this rule should be deferred until there is resolution of possible MDP issues. It was noted that only New York has addressed this general topic in the form of a strategic alliance regulation. It also was noted that California has an opportunity to be a leader on this issue. Following discussion, Mr. Tuft and Mr. Vapnek were assigned to survey what other states are doing on this issue and provide a recommendation for direction on rule 1-310 at the next meeting.

**G. Public Comment Outreach Status**

The Chair referred to the written comment received to date that has been distributed to each Commission member. The Chair directed each assigned codrafter to include consideration of relevant public comment letters in handling their respective assignments.

Regarding dissemination of rule drafts developed by the Commission and tentatively completed but not yet authorized for public comment distribution by the Board of Governors, staff reported that this work product is considered public record information and that an area on the State Bar website is being developed to post the Commission’s agenda and meeting summaries. This area could also identify rule drafts that are tentatively completed but awaiting submission to the Board for public comment authorization. As public information, interested persons, including local bar ethics committees and other groups, could get a head-start in analyzing the Commission’s rule drafts.

**H. Discussion of Tentatively Adopted Rules for Public Comment**

The Chair invited discussion of an appropriate process for disseminating rule

drafts developed by the Commission and tentatively completed but not yet authorized for public comment distribution by the Board of Governors. It was noted that the ABA Ethics 2000 Commission made this kind of information accessible to any interested person. Staff reported that Commission work product of this nature is considered public record information and that an area on the State Bar website is being developed to post the Commission's agenda and meeting summaries. This area could also identify rule drafts that are tentatively completed but awaiting submission to the Board for public comment authorization. As public record information, interested persons, including local bar ethics committees and other groups, could get a head-start in analyzing the Commission's rule drafts.

It was noted that a concept of tentatively approved proposed rule amendments calls for a decision on a proposed rule numbering system. Following discussion, the consensus was that the issue of a rule numbering system should be placed on the next agenda as the next agenda is anticipated to also include discussion of rule 1-100.

#### **IV. REPORTS OF THE COMMISSION MONITORS**

##### **A. Supreme Court Advisory Task Force on Multijurisdictional Practice**

Matter carried over.

##### **B. Family and Juvenile Law Advisory Committee of the Judicial Council**

Matter carried over.

##### **C. Pro Bono Subcommittee of the State Bar Standing Committee on the Delivery of Legal Services**

Matter carried over.

##### **D. Discreet Task Representation Committee of the State Bar Access to Justice Commission**

Matter carried over.

**E. Judicial Council’s Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System–Working Group of the Civil and Small Claims Advisory Committee Alternative Dispute Resolution Subcommittee**

Matter carried over.

**F. COPRAC AB 363 Subcommittee**

In response to a member’s question concerning the Supreme Court’s order not approving proposed amended rule 3-600, there was a staff report on the status of AB 363 (re: government attorney whistleblowers). State Bar Deputy Executive Director Robert A. Hawley was present and gave an oral report. Following discussion, it was agreed that Mr. Melchior would lead a subcommittee of Commission members (Mr. George, Mr. Lamport, Mr. Sapiro, Mr. Tuft and Mr. Vapnek) in considering whistleblower issues and possible amendments to the rules or other appropriate recommendations for Commission action.

**G. Joint Task Force of the Judicial Council and the State Bar on AB 2069**

Matter carried over.